Mohamad Khirul Mizan bin Shafie & Anor v Yue Ah Kai

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 12-6 OF 1999
MOHD HISHAMUDIN J
29 JULY 2002

Damages (Personal Injury or Death) *— General Damages — Assessment*

Damages (Personal Injury or Death) *— Quantum — Special damages — Loss of earnings — Whether the first plaintiff could claim RM500 per month as loss of earnings without any documentary evidence to support the claim — Whether the second plaintiff could claim RM400 per month as loss of earnings without any documentary evidence to support the claim*

Tort *— Negligence — Road accident — Whether plaintiffs were liable for the accident — Whether defendant was liable for the accident*

This is an appeal against the decision of the sessions court dismissing the plaintiffs' action for damages in respect of injuries suffered as a result of an accident involving the parties. The learned sessions court judge found that the plaintiff failed to prove their case on a balance of probabilities solely because of the position of the plastic splinters, as shown by the sketch plan (P2), on the defendant's side of the road. On quantum, it was agreed that the defendant pay the first and second plaintiffs RM534 and RM162, respectively, as special damages. On the issue of loss of earnings, the first plaintiff claimed RM500 per month as he was employed by his brother as a mechanic and did not work for 18 months. This was confirmed by his brother although there were no documents pertaining to his employment. On the issue of general damages, the first plaintiff claimed for four types of injuries as a result of the accident. On loss of earnings, the second plaintiff also stated that he worked as a mechanic with a salary of RM400 per month and that he was unable to work for a year. His employer confirmed this. On the issue of general damages, the second plaintiff claimed for three types of injuries that he suffered as a result of the accident.

Held, allowing the appeal with costs:

(1) It was clear that the respondent/defendant (the driver of the bus) was guilty of negligence as the evidence showed that the bus cut across the path of the motorcycle ridden by the plaintiffs, in a manner that the plaintiffs could not avoid a collision. There was no reason to doubt the credibility of the plaintiffs. They had been cross-examined and their testimony remained unshaken. Evidence regarding the nature of the damage to the two vehicles were all consistent with the plaintiffs' version. It was also pertinent to note that the defendant, unlike the plaintiffs, was not able to explain how the accident occurred (see p 475F–H).

(2) On the issue of loss of earnings, the evidence of the first plaintiff was supported by the testimony of his employer, his evidence could not be rejected outright. However, in the light of the absence of supporting documents, the amount was reduced to RM400 per month (see p 476E–F).

(3) In view of the absence of supportive documentary evidence of the second plaintiff's employment, the court reduced the amount for his loss of earnings to RM300 per month (see p 479B).

(4) The total amount of the awards for general damages for personal injuries for the first plaintiff was RM66,000. From this amount, 10% was deducted for overlapping, thus leaving a sum of RM59,400 (see p 478F–G).

(5) The total amount of the awards for general damages for personal injuries for the second plaintiff was RM45,000. From this amount, a deduction of 10% for overlapping was made, thereby leaving a sum of RM40,500 (see p 480C).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah sesyen menolak tindakan plaintif-plaintif untuk ganti rugi bagi kecederaan yang dialami mereka akibat satu kemalangan yang melibatkan pihak-pihak di dalam tindakan tersebut. Hakim mahkamah sesyen yang bijaksana telah mendapati bahawa plaintif-plaintif telah gagal membuktikan kes mereka di atas imbangan kebarangkalian hanya berdasarkan di atas kedudukan serpihan plastik, seperti yang ditunjukkan di dalam sketsa plan (P2), berada di sebelah jalan defendan. Berkenaan dengan kuantum, kedua-dua pihak telah bersetuju bahawa defendan membayar plaintif pertama dan plaintif kedua RM534 dan RM162 masing-masing bagi ganti rugi khas. Berkenaan dengan kehilangan mata pencarian, plaintif pertama telah menuntut RM500 sebulan memandangkan yang beliau bekerja dengan abangnya dan telah tidak bekerja selama 18 bulan. Ini telah disahkan oleh abang plaintif pertama walaupun tiada keterangan dokumentari mengenainya. Berkenaan dengan ganti rugi am, plaintif pertama telah menuntut bagi empat jenis kecederaan yang dialaminya akibat kemalangan tersebut. Bagi plaintif kedua, berkenaan dengan kehilangan mata pencarian, beliau telah mengatakan bahawa beliau juga bekerja sebagai mekanik dengan gaji sebanyak RM400 sebulan dan bahawa beliau telah tidak bekerja selama satu tahun. Majikannya telah mengesahkan perkara tersebut. Berkenaan dengan ganti rugi am, plaintif kedua telah menuntut bagi tiga jenis kecederaan yang dialaminya akibat kemalangan tersebut.

Diputuskan, membenarkan rayuan:

(1) Adalah jelas sekali bahawa responden/defendan (pemandu bas tersebut) telah cuai kerana keterangan menunjukkan bahawa bas

tersebut telah memotong arah laluan motosikal yang ditunggangi oleh plaintif-plaintif yang mana plaintif-plaintif telah tidak dapat mengelak daripada berlakunya perlanggaran. Tiada sebab untuk meragui kebolehpercayaan plaintif-plaintif. Mereka telah diperiksa balas dan testimoni mereka tidak berganjak. Keterangan berkenaan dengan kerosakan pada kedua-dua kenderaan tersebut juga adalah konsisten dengan versi plaintif-plaintif. Adalah penting juga untuk diperhatikan bahawa defendan, tidak seperti plaintif-plaintif, telah tidak dapat menjelaskan bagaimana kemalangan tersebut berlaku (lihat ms 475F–H).

(2) Berkenaan dengan kehilangan mata pencarian, keterangan plaintif pertama telah disokong oleh testimoni majikannya. Keterangan beliau tidak boleh ditolak sama sekali. Walau bagaimanapun, dengan ketiadaan keterangan dokumentari untuk menyokongnya, amaun tersebut telah dikurangkan kepada RM400 sebulan (lihat ms 476E–F).

(3) Memandangkan tiada keterangan dokumentari untuk menyokong pekerjaan plaintif kedua, mahkamah telah mengurangkan amaun bagi kehilangan mata pencariannya kepada RM300 sebulan (lihat ms 479B).

(4) Jumlah keseluruhan amaun ganti rugi am bagi kecederaan diri yang dialaminya, plaintif pertama telah diawardkan sebanyak RM66,000. Daripada jumlah ini, 10% telah ditolak untuk mengambil kira pertindihan, menjadikannya sebanyak RM59,400 (lihat ms 478F–G).

(5) Jumlah keseluruhan amaun award ganti rugi am bagi kecederaan diri yang dialaminya oleh plaintif kedua adalah sebanyak RM45,000. Daripada jumlah ini, telah ditolak 10% untuk mengambil kira pertindihan, menjadikannya sebanyak RM40,500 (lihat ms 480C).

Notes

For cases on assessment of general damages, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 385.

For cases on special damages, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1412 (also paras 1450–1451).

For cases on road accidents, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 887–1108.

Cases referred to

Angappan v Phua Kim Cheng, Administrator of the Estate of Phua Teck Guan 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1179 (folld)

Chan Kau Tong v Ngoh Yong Sin [1965] 2 MLJ xxvi (folld)

Chong Kam Siong v Herman bin Baharuddin 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 908 (refd)

Er Siew Keng v Eng Thiang Lai [1990] 1 CLJ 488 (refd) A
Fauziyah bte Mansor v Abu Bakar bin Hussin 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1143 (folld)
Ji Wee Sin v Lim Chong Soon & Anor 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1074 (folld)
Lee Eng Beng & Anor v Torairajah & Anor [1987] 1 MLJ 121 (refd)
Rohani bte Mamat & Ors v Wan Ismail bin Wan Talib & Anor 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 741 (folld) B
Rubiah Anuar v Lim Sang [1998] 3 CLJ Supp 314 (folld)
Shuib bin Awang v Abdul Manan bin Abdul Latif 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 339 (refd)
Sulaiman bin Aziz v Abd Razak bin Abd Wahab 6 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1261 (folld) C
Victor Alphonse Sebastian & Anor v Lee Ah Leek 1987 2 MLJ xxi (refd)
Yee Yat Wah v Hoo Wong & Anor 6 *Mallal's Digest* (4th Ed,1997 Reissue) para 1278 (folld)

Appeal from: Summons No 53–77 of 1995 (Sessions Court, Temerloh) D

G Dorai (*G Dorai & Co*) for the appellants.
Clement Joseph (*Dass Jainab & Assoc*) for the respondent.

Mohd Hishamudin J: This is an appeal against the decision of the learned Sessions Court Judge, Temerloh of 1 March 1999 dismissing the appellants'/plaintiffs' action against the respondent/defendant for damages in respect of injuries suffered. E

I allowed the appeal with costs on 9 May 2000. In my view, the findings and decision of the sessions court judge was against the weight of evidence. On the evidence, she ought to have found the defendant liable in negligence and decided in favour for the plaintiffs. I shall now give my grounds. F

ON THE ISSUE OF LIABILITY

On 26 November 1994, at about 11.30pm, a collision occurred between a motorcycle ridden by the plaintiffs (with the first plaintiff, PW4, as the rider; and the second plaintiff, PW3, as the pillion rider) and a bus driven by the defendant somewhere along the Raub-Kuala Lipis road. Both plaintiffs suffered serious physical injuries as a result of the accident. G

According to the plaintiffs, they were from the direction of Kuala Lipis heading towards the direction of Raub while the defendant was from the opposite direction. Originally, each party's vehicle was on its proper lane. However, as the plaintiffs' motorcycle was about to pass a Mobil petrol station, which was on the left side of the motorcyclists, the bus, driven by the defendant, made a sudden turn to its right, thereby cutting into the path of the motorcyclists. PW4 reacted by swerving to the right but was unable to avoid a collision. His motorcycle knocked into the left side of the bus. H I

Unlike the plaintiffs, the defendant (the bus driver) was not able to relate how the accident occurred. The defendant in evidence merely

A confirmed that he was from the direction of Raub heading towards Kuala Lipis and that the plaintiffs' motorcycle knocked into the rear left side tyre of his bus. He stopped his bus somewhere in the middle of the road, got down from the bus, and saw the motorcycle lying near the rear on the left side of his bus. He did not say from which direction the motorcycle came. Indeed, he did not mention seeing the motorcycle prior to the accident. The B defendant denied cutting into the lane of the plaintiffs.

The learned sessions court judge, in her grounds of judgment, found that the plaintiffs had failed to prove their case on a balance of probabilities. In so finding, she relied solely on one factor: that, based on the position of the plastic splinters as shown by the sketch plan, P2, the collision occurred C on the defendant's side of the road. Since the collision occurred on the defendant's side of the road, she was, therefore, of the view that the defendant could not be guilty of negligence. With respect, her grounds of judgment was, however, and unfortunately, very brief and rather more descriptive in nature (merely restating what each of the witnesses had said in evidence), lacking an in-depth analysis of the whole evidence. In the D relevant part of her grounds of judgment, she merely said:

> Daripada keterangan bebas melalui P2 yang menunjukkan kedudukan serpihan kaca, mahkamah memutuskan bahawa perlanggaran telah berlaku di lorong motorbas tersebut. Kerosakan kepada kedua kenderaan tersebut adalah konsisten dengan versi SP4 (PW4) dan versi SD1 (the defendant).

E For one thing, what did she mean by 'Kerosakan kepada kedua kenderaan tersebut adalah konsisten dengan versi SP4 (PW4) dan versi SD1 (the defendant)'?

Be that as it may, having made the above observations and finding, she then abruptly came to the following conclusion:

F

> Mahkamah memutuskan bahawa pihak merayu tidak membuktikan tuntutan mereka di atas imbangan kebarangkalian. Tuntutan pihak merayu (plaintiff's) ditolak dengan kos.

In my judgment, it is clear to me that the respondent/defendant (the driver G of the bus) was guilty of negligence as the evidence shows that the bus cut across the path of the motorcycle ridden by the plaintiffs, in a manner that the plaintiffs could not avoid a collision. I see no good reason to doubt the credibility of the plaintiffs who were the rider (PW4) and pillion rider (PW3) of the motorcycle. They had been cross-examined and their testimony remained unshaken. Moreover, evidence regarding the nature of H the damage to the two vehicles, including the point of impact to the bus, evidence regarding the likelihood of where the collision occurred (that is at point 'G' in the sketch plan, P2, where plastic splinters from the plaintiffs' motorcycle were found lying on the road), and evidence of where the plaintiffs' motorcycle was found lying on the road (that is at point 'F' in the sketch plan) are all consistent with the plaintiffs' version, in particular, their I evidence that PW4 had swerved to the right in order to avoid the collision. It is also pertinent to note that the defendant, unlike the plaintiffs, was not able to explain how the accident occurred.

ON QUANTUM

I *In respect of the claim of the first plaintiff*

(A) Special damages

It is agreed by the parties in the written submissions that the defendant pays the first plaintiff a sum of RM534 as special damages. But the nature or purpose of this special damages is not clear. Nevertheless, I made the order accordingly.

(B) Special damages: Loss of earnings

The first plaintiff claims for loss of earning of RM500 per month for 18 months.

The first plaintiff gave evidence that, prior to the accident, he was employed as a mechanic by his brother, one En Razali bin Shafie ('PW2'), at a workshop. The first plaintiff said that as a mechanic he was paid RM500 per month. Encik Razali confirmed the evidence of the first plaintiff and added that, after the accident, the first plaintiff did not come to work for 18 months. Neither the first plaintiff nor PW2, however, was able to produce any document pertaining to the employment of the former.

The defendant urged this court to dismiss the claim for loss of earnings on the grounds that the claim was not supported by any documentary evidence. Alternatively, it was argued that if the court was minded to make an award for loss of earnings, then it should be at the rate of RM200 per month for 18 months.

I am of the view that since the evidence of the first plaintiff was supported by the testimony of his employer, I just could not reject his evidence outright. However, I am of the view that in the light of the absence of supporting documents the amount should be reduced to RM400 per month. Therefore, the amount awarded for loss of earnings was RM400 x 18 = RM7,200.

(C) General damages

(1) Compound grade III B comminuted supracondylar fracture of left femur with extension into knee joint

In respect of this injury, the first plaintiff claims a sum of RM40,000 based on the following cases:

(a) *Lee Eng Beng & Anor v Torairajah & Ors* [1987] 1 MLJ 121;

(b) *Victor Alphonse Sebastian & Ors v Lee Ah Leek* [1987] 2 MLJ xxi; and

(c) *Rubiah Anuar v Lim Sang* [1998] 3 CLJ Supp 314.

The defendant, on the other hand, submited that the award for fracture of the left femur should be RM30,000, relying on *Othman bin Ahmad v Samsudin bin Hj Mohd Sani & Anor* 6*Mallal's Digest* (4th Ed, 1997 Reissue) para 1114.

A The first plaintiff suffered a serious injury to his left leg. As a result of the injury, he suffers the following permanent disabilities:

(a) a true shortening of 4.5cm of his left lower limb;

(b) wasting of his left lower limb and his inability to stand on his left leg alone and his inability to run;

B (c) marked limitation of flexion of his left knee joint and his inability to squat; and

(d) a discharging sinus in his left thigh.

Taking into account of the cases cited by the plaintiff, in particular, *Rubiah Anuar*, I made an award of RM40,000 for this injury. In *Rubiah Anuar*, C the award for a compound fracture of the medial condyle of the right femur was RM37,000. The court there relied on *Victor Alphonse Sebastian* (where the award was RM33,000) as a guide. In the present case, the award is higher by RM3,000, if compared to *Rubiah Anuar*. But I think this is justified taking into account the permanent disabilities suffered by the D first plaintiff (as set out in (a) to (e) above) in the case before me. The facts of *Rubiah Anuar* did not disclose the presence of such permanent disabilities.

(2) Closed fracture mid-shaft left radius

E The plaintiff claims RM12,000 on the authority of *Angappan v Phua Kim Cheng, Administrator of the Estate of Phua Teck Guan, deceased* 6 *Mallal's Digest* (4th Ed,1997 Reissue) para 1179 at p 343. In this Singapore case cited (decided in 1992), the award handed down by the court for a fracture of the left radius was S$12,000.

F The defendant, on the other hand, suggests a sum of RM8,000 basing on *Er Siew Keng v Eng Thiang Lai* [1990] 1 CLJ 488. In this case cited by the defendant, the High Court had made an award of RM15,000 for the fracture of the right radius and ulna.

I think *Angappan*, although a Singapore case, is a better guide as compared to *Er Siew Keng*. First, *Angappan*, like the present case, concerns G a fracture to the left radius, whereas the latter case concerns a fracture of both ulna and radius. Second, while *Er Siew Keng* was decided in 1990, *Angappan* was decided in 1992 and therefore much nearer in point of time to the present case. I think an award of RM12,000 would be fair for this particular item of injury, although this amount is much lower than the award made in *Angappan*, which was in Singapore dollars.

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(3) Closed fracture of left fourth metacarpal

The first plaintiff suggested a sum of RM4,000, whilst the defendant proposed a sum of RM2,000. I am of the view that on the authority of *Sulaiman bin Aziz v Abd Razak bin Abd Wahab* 6 *Mallal's Digest* (4th Ed, I 1997 Reissue) para 1261 at p 378 and *Rohani bte Mamat & Ors v Wan Ismail bin Wan Talib & Anor* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 741 at p 213, the appropriate award should be RM4,000.

The defendant relied on *Shuib bin Awang v Abdul Manan bin Abdul Latif* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1210. There, the court made an award of RM4,000 for the fracture of two metacarpals.

However, in *Rohani bte Mamat*, the award for a long oblique fracture of first metacarpal of the right hand was RM4,000; and in *Sulaiman bin Aziz*, the award for the fracture of the fifth metacarpal was also RM4,000.

(4) Scarring

The first plaintiff submitted the sum of RM10,000, whilst the defendant contended that it should be RM3,000. The first plaintiff relied on *Yee Yat Wah v Hoo Wong & Anor; Shim Chin Tong (Third party)* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1278 at p 387; *Ji Wee Sin v Lim Chong Soon & Anor,* 6 *Mallal's Digest* (4th Ed,1997 Reissue) para 1074 at p 298 and *Rubiah Anuar.*

The defendant, on the other hand, did not cite any authority.

Using the cases cited by the first plaintiff as a guide, I am of the view that an award of RM10,000 would be fair and reasonable.

In *Yee Yat Wah* (decided in 1994), the award for scars (including a longitudinal 9cm scar extending from the ventral surface of the base of the penis into the perineum) was RM12,000. In *Ji Wee Sin* (decided in 1993), the Singapore High Court made award of S$8,000 for scars (in particular, scars over the right sheen). In *Rubiah Anuar*, the court awarded RM10,000 for the following scars suffered by the plaintiff:

(a) a vertical linear operative scar 13cm long on the lateral aspect of the right lower thigh;

(b) a curvilinear operative scar on the front of the right knee 24 x 2cm long; and

(c) a 14 x 7 x 12 x 8cm quadrangular hypopigmented scar on the front of the right thigh.

The total amount of the awards for general damages for personal injuries was RM66,000 (RM40,000 + RM12,000 + RM4,000 + RM10,000 = RM66,000). From this amount, I have deducted 10% for overlapping, thus leaving a sum of RM59,400.

II *In respect of the claim of the second plaintiff*

(A) Special damages

It was agreed by both parties that the defendant do pay the second plaintiff a sum of RM162 as special damages. I made the order accordingly. However, just as in the case of the first plaintiff, the nature or purpose of this special damages is not clear.

(B) Special damages: Loss of earnings

The second plaintiff has given evidence that he, like the first plaintiff, also worked for PW2 as a mechanic, with a salary of RM400 per month, and this

A was confirmed by the evidence of his employer, PW2. The second plaintiff also said that as a result of the accident he was unable to work for one year.

Although I see no reason not to accept this evidence of the second plaintiff, nevertheless, in view of the absence of supportive documentary evidence, I reduced the amount to RM300 per month. Thus the amount
B awarded for loss of earnings was RM300 x 12 = RM3,600.

(C) General damages

(1) Closed fracture of left femur

C The permanent disabilities suffered by the second plaintiff as a result of the fracture to the left femur are as follows:

(a) 1.5cm shortening of the left lower limb;

(b) wasting of the left lower limb and the inability to stand on the left leg alone for too long and the inability to run;

D (c) limitation of flexion of the left knee joint and the inability to squat; and

(d) discharging of sinus due to chronic osteomyelitis.

The counsel for the second plaintiff, relying on:

(a) *Lee Eng Beng*;

E (b) *Victor Alphonse Sebastian*; and

(c) *Rubiah Anuar*

urged the court to make an award of RM35,000. On the other hand, counsel for the defendant, citing *Chong Kam Siong v Herman bin Baharuddin* 6 *Mallal's Digest*(4th Ed, 1997 Reissue) para 1262 at p 343, argued that, for
F the fracture of the left femur and other injuries, the second plaintiff should be paid a global sum of RM20,000.

In my view, based on the cases cited, in particular, *Rubiah Anuar*, the amount of RM35,000 for the fracture of the left femur, is a fair sum to be awarded.

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(2) Cerebral concussion

The learned counsel for the second plaintiff submitted a sum of RM5,000 on the authority of:

H (a) *Fauziyah bte Mansor v Abu Bakar bin Hussin*, 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1143 at p 325; and

(b) *Chan Kau Tong v Ngoh Yong Sin* [1965] 2 MLJ xxvi.

In case (a) above, a Singapore High Court case (date of hearing 1993), the award for cerebral concussion was S$3,000.

I In case (b), the award given by the High Court of Singapore in 1965 for cerebral concussion was S$5,000. There, the injury was more serious as there was a retardation in the cerebration and the patient was rather slow in

voicing opinion. However, there was no gross impairment of intelligence and the brain did not suffer any permanent organic damage. A

In my judgment, in the present case, relying on the aforesaid cases (a) and (b) as comparables, I am of the opinion that an award of RM5,000 is reasonable.

B

(3) Scarring

The second plaintiff, as a result of the injury, suffered a 17cm healed scar on the left thigh. Based on the authorities earlier cited when dealing with the first plaintiff, I awarded the second plaintiff a sum of RM5,000.

The total amount of the awards for general damages for personal injuries was RM45,000 (RM35,000 + RM5,000 + RM5,000 = RM45,000). From this amount, likewise, I have made a deduction of 10% for overlapping, thereby leaving a sum of RM40,500. C

I awarded costs to the appellants/plaintiffs in respect of the proceedings before this court and also in respect of the proceedings before the lower court. D

Appeal allowed with costs.

Appeal allowed with costs.

Reported by D Sivalingam E

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